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Supreme Court, U.S.
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No. 01-1572

In the

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether local government entities are subject to *qui tam* actions under the False Claims Act. 31 U.S.C. §3729.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for writ of *certiorari* seeking review of the Seventh Circuit's decision in this case. The opinion of the Seventh Circuit (App. 1a-26a[1]) is reported at 277 F.3d 969 (7th Cir. 2002).

STATEMENT OF THE CASE

A. Background

This lawsuit involves claims brought by respondent under the False Claims Act ("FCA"), 31 U.S.C. §3729, against petitioner, Cook County, Illinois, and Hektoen Institute for Medical Research ("Hektoen"). Petitioner's description of the serious false claims allegations made against it by respondent is incomplete and might be taken to suggest that petitioner's involvement in those false claims was minimal. In fact, petitioner—through Cook County Hospital ("CCH"), which it owns and operates[2]—was actively involved in the operation of the grant and the related false claims at issue here from beginning to end. In March, 1989, CCH was awarded $5,000,000.00 in federal funds from the National Institute of Drug Abuse ("NIDA"), to implement a research study of at least 300 drug-dependent pregnant women.

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[1] Citations to the petition for *certiorari* will be in the form of "Pet. __"; citations to the appendix to the petition will be in the form of "App. __."

[2] The district court dismissed CCH as a defendant because it has no "legal existence separate from that of Cook County." App. 47a.

The women were to be randomly assigned either to a comprehensive "one-stop" medical and social service program provided by CCH or to substance-abuse and medical services otherwise available within the community. Amended Complaint, at ¶¶1-3.

By August, 1993, CCH had fallen far short of its commitment, enrolling fewer than half the required number of women. CCH was placed on probation and was given until December, 1993 to demonstrate significant improvement in enrollment or lose its funding. *Id.*, at ¶67. In response, CCH agreed to transfer administration of the grant to Hektoen, a private non-profit affiliate of CCH, organized for the purpose of receiving grants and administering research programs.[3] *Id.*, at ¶26. Dr. Ellen Mason, an employee of CCH, became the principal investigator, and the research continued to be performed by CCH. *Id.*, at ¶¶69-72. In December, 1993, CCH reported that 205 research subjects were enrolled and randomly assigned. In truth, however, at least 45 of these "research subjects" were "ghosts"—persons not enrolled in the program. *Id.* Dr. Mason directed that the "ghosts" not be disclosed to NIDA, and refused to adjust the enrollment figure. *Id.*, at ¶70. As a result of CCH's false claim of significant progress, NIDA lifted CCH's probation. Seven months later, CCH and Hektoen sought, and received, additional funding based on CCH's claim that 87 births were expected from patients who could no

[3] Respondent, Dr. Janet Chandler, worked for Hektoen as the project director of the grant. Although respondent's wrongful termination claim against Cook County was dismissed on the grounds that Cook County was not her employer, App. 47a-48a, respondent's retaliatory discharge claim against Hektoen under the FCA is ongoing. Amended Complaint, at ¶¶112-16.

longer be part of the study if the grant were not extended. *Id.*, ¶72. In truth, however, only seven research subjects were pregnant. *Id.* As a result of its false claims, therefore, petitioner received over $5,000,000.00 in federal funds.

B. The Statutory Structure and *Stevens*

The FCA, as amended, establishes civil penalties for "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," or who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. §§3729(a)(1), (3). In 1986, the statute was amended, *inter alia*, to increase the damages that may be awarded from double damages to treble damages. A person who violates §3729 is "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." §3729(a). A private individual, called a relator, can bring a *qui tam* action for these damages in the government's name. 31 U.S.C. §3730(b)(1).

The Court has held that states are not persons within the meaning of §3729 and so cannot be subject to liability under that section. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Despite many amendments to the FCA over the years, the Court held that "the term 'person' has remained in the statute unchanged since 1863." *Id.*, at 1868, n. 12. Pointing to the "longstanding presumption that 'person' does not include the sovereign," the Court then held that this presumption could be "disregarded only upon some

affirmative showing to the contrary." *Id.*, at 1867. Because the original statute's liability provision "bore no indication that states were subject to its penalties," the presumption that states were not "persons" controlled. *Id.*

The Court then turned to the 1986 amendments for evidence that Congress intended to broaden the original Act's coverage to include states. *Id.*, at 1868-70. It concluded that nothing in the text or legislative history of the 1986 amendments indicated a congressional intent to "modify or expand" the term "person" to include states. To reinforce this conclusion, the majority noted that "the current version of the FCA imposes [treble] damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities," citing *City of Newport v. Fact Concert, Inc.*, 453 U.S. 247 (1981). For this and other reasons, the Court held that states are not persons under the FCA and so cannot be held liable.

C. Proceedings Below

The analytic framework of the Seventh Circuit's opinion tracks *Stevens*. Like the Court in *Stevens*, the Seventh Circuit began with the central issue of whether local units of government are persons within the meaning of the FCA. *U.S. ex rel. Chandler v. Cook County*, 277 F.3d 969, 974 (2002); App. 8a. Following the Court's holding that the term "person" remained unchanged throughout the FCA's history, the Seventh Circuit considered the text and legislative history of the original Act as enacted in 1863. Because by 1844 (almost two decades before the FCA), both private and municipal corporations (unlike

states) were presumptively included within the meaning of persons, *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89 (1978), the Seventh Circuit held that local governments (unlike states) were intended, under the original Act, to be "persons" under the FCA. *Id.*

Next, the Seventh Circuit, like *Stevens*, examined the 1986 amendments and found no congressional intent to change the longstanding meaning of the word "person" under §3729 to exclude local units of government. *Id.*, at 974; App. 9a. Indeed, the Seventh Circuit held that three different aspects of the 1986 amendments "point[ ] to a finding of continued municipal liability." *Id.* Specifically, the court looked to (a) the Civil Investigative Demand ("CID") provision, 31 U.S.C. §3733(a)(1), which provides the Department of Justice with a new weapon to discover fraud and which defines person to include states and local subdivisions, *id.*, at 975; App. 9a-10a; (b) the "whistleblower" provision protecting relators and witnesses from retaliation by employers, including, according to the Senate Judiciary Committee report, public-sector employers, *id.*; App. 10a-11a; and (c) other changes which make it easier and more likely that *qui tam* actions will be brought, including the increased damages and changes in the damages allocation between the relator and the government. *Id.*, at 976; App. 11a-12a. Based on its review of these changes, the Seventh Circuit concluded that Congress knew both that municipalities were subject to liability under the Act, and that its main goal in enacting the 1986 amendments was to make "it more likely for FCA claims to be filed and to succeed." *Id.*, at 975; App. 10a, 13a. Nothing about the 1986 amendments supports a conclusion they exempted municipalities from liability. To the contrary, the Seventh Circuit concluded, "Congress intended to include counties within the meaning of 'persons.'" *Id.*; App. 13a.

Despite this conclusion, the Seventh Circuit separately considered "whether Congress has made it sufficiently clear that municipalities do not enjoy the traditional common-law immunity of municipalities" from the type of "essentially punitive" treble damages provided by the 1986 Amendments to the FCA. *Id.*, at 976-77; App. 13a. Here again, the Seventh Circuit found the answer in the approach specified by the Court. *Id.*, citing *Newport*, 435 U.S. 247. Just as the court in *Stevens* focused on Congress' intent in passing and amending the FCA, so, too, the court in *Newport* sought to identify Congress' intent in enacting the Civil Rights Act of 1871.

The specific issue in *Newport* was whether punitive damages were recoverable against a local government in a lawsuit brought under 42 U.S.C. §1983. Section 1983, however, made no provision for damages. *Id.*, at 977; App. 14a. The Court therefore examined the historical context and legislative history of the Civil Rights Act of 1871 to determine Congress' intent. The Court could find no evidence that Congress intended to disturb local governments' common-law immunity from punitive damages. *Newport*, 453 U.S. at 265. And it concluded, based on the policy considerations motivating §1983, that municipal liability for punitive damages would not serve the statute's primary purposes of compensation and deterrence. *Id.*, at 267-71.

The Seventh Circuit followed *Newport*'s lead by examining the claim of immunity for municipalities and its "compatibility with the purpose" of the FCA. *Chandler*, 277 F.3d at 977; App. 14a, quoting 453 U.S. at 259. In so doing, the Seventh Circuit recognized "important differences between [the damages] available under §1983 and those imposed by the FCA." *Id.*, at 978; App. 15a. First, "[u]nlike §1983, the FCA does not need to borrow a

common-law conception of damages; Congress has provided a clear and consistent remedy for all violations of the FCA." *Id.*, at 978; App. 15a-16a. Furthermore, the remedy mandated is not divided into compensatory and punitive damages, but instead calls for a trebling of actual loss which, while "punitive in nature . . . is nevertheless a response specifically determined by Congress as necessary for the effective operation of the FCA." *Id.*; App. 16a. As the Seventh Circuit reasoned:

> It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute. Notably, Congress did make an exception to the general measure of damages when the person who defrauded the Government cooperates before having learned of the investigation. 31 U.S.C. §3729(a)(7)(A)-(C). . . . By contrast, Congress made no adjustment to the general scheme for municipal entities.

Id.; App. 16a. Thus, the Seventh Circuit concluded, "[t]o hold that municipalities are immune, we would have to conclude that, in effecting the increase [in damages], Congress intended to exempt municipalities from the FCA *sub silentio*." *Id.*, at 979; App. 17a.

The Seventh Circuit also recognized that the "important differences between the punitive damages available under §1983 and those imposed by the FCA" mitigate the risks discussed in *Newport*. *Id.*, at 978; App. 15a. Specifically, under the FCA, (a) the treble damages are imposed by a judge and, by definition, have a specific upper limit that is rationally related to the federal government's loss, *id.*, at 978; App. 15a-16a; and (b) a por-

tion of the recovery comes from the monies taken by the local government through its false claim, and "the local taxpayers have already received, without justification, some of the benefit." *Id.*; App. 15a.

In sum, the Seventh Circuit explained, Congress has not changed the definition of "person" since the adoption of the original FCA. *Id.*, at 978; App. 16a. Second, Congress knew in 1986 both that municipalities were covered by the original FCA and that "[b]illions of dollars flow from the federal government to municipalities each year." *Id.*, at 980; App. 18a. This knowledge, combined with Congress' focused effort in 1986 to "strengthen . . . [the FCA's] comprehensive mechanism designed to remedy fraud against the federal government," establish that Congress in no way intended to exempt municipalities from the FCA, *sub silentio*, when it increased the damages from double to treble. *Id.* App. 17a.

REASON FOR DENYING THE WRIT

Petitioner's argument for why this Court should grant *certiorari* rests on three principle reasons: (1) a shallow circuit split, in which no court has yet considered the reasoning of the Seventh Circuit; (2) the important and recurrent nature of the issue; and (3) petitioner's attack on the careful and thorough Seventh Circuit opinion itself. As respondent will now show, none of these reasons warrant a grant of *certiorari*.

I. The circuit split is shallow and subject to change.

If ever there were an issue where further percolation was warranted, this is it. The split here is very shallow, as only three circuit courts have even considered the

question of whether local governments are subject to *qui tam* actions under the False Claims Act. Of those three, only the Seventh Circuit conducted a thorough analysis of the reasoning of *Stevens* to hold in the instant case that local governments are subject to such suits. Neither of the other two courts to decide the question—the Third and the Fifth Circuits, each of which ruled that local governments are not subject to such suits—addressed the Seventh Circuit's analysis,[4] or, for that matter, follow *Stevens*. *See Garibaldi*, 244 F.3d 486 ("much of the reasoning in the [*Stevens*] opinion [is not] particularly instructive in resolving the issue presented" because *Stevens* rested on the "interpretive presumption that the term 'person' does not include the sovereign" while "local governments do not enjoy the same sovereign status as states"); *Dunleavy*, 279 F.3d 219. Both *Garibaldi* and *Dunleavy* fail to account for the presumptive meaning of "person" in 1863 in light of *Stevens'* holding that the word "person" in the FCA means what it did in 1863.

Other courts of appeals will soon have the opportunity to address the issue. Appeals involving the question are currently pending in both the Eleventh and D.C. Circuits. *See United States ex rel. King v. Jackson County Hospital Corp.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001), appeal pending, No. 02-11471-A (11th Cir.), and

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[4] The Fifth Circuit ruled before the Seventh Circuit did. *See United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 808 (2002). The Third Circuit's opinion, *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3d Cir. 2002), issued only a week after the Seventh Circuit issued its opinion, neither cited the Seventh Circuit opinion nor addressed any of its arguments.

United States ex rel. K&R Limited Partnership v. Massachusetts Housing Finance Agency, 154 F.Supp.2d 19 (D.D.C. 2001), appeal pending, No. 02-5043 (D.C. Cir.). And as petitioner itself pointed out, Pet. at 15-19, the issue has arisen frequently in district courts around the country, making it very likely that even more circuits will be considering the issue in the near future.

Each of these courts will have the opportunity to do what the Third and Fifth Circuits did not do—consider and respond to the Seventh Circuit's reasoning and analysis. And since the Seventh Circuit is the only court of appeals to recognize that the reasoning and holdings of *Stevens* and *Newport* dictate the answer to the issue presented here, the currently-shallow circuit split may well resolve itself as the other courts of appeals consider the Seventh Circuit analysis. *See* Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986), at 199, n. 30 (noting that *certiorari* may not be warranted where "further litigation . . . might produce a consensus or a satisfactory majority view among the lower courts").[5]

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[5] Further percolation is also warranted because the development of other, related issues, may inform the resolution of this one. The *Garibaldi*, *Dunleavy*, and *Chandler* courts all concluded that imposing liability on municipalities but limiting that liability to non-punitive damages was not allowed by the statute. *Chandler*, 277 F.3d at 979; app. 18a; *Dunleavy*, 279 F.3d at 225; *Garibaldi*, 244 F.3d at 493. But such a remittitur may in fact be found permissible and warranted by other courts. *See United States v. Mackby*, 261 F.3d 821, 829-31 (9th Cir. 2001) (remanding the treble damages and $550,000.00 in penalties for an excessive-fine analysis under the 8th Amendment); *United States v. Halper*, 490 U.S. 435, 448-50 (1989) (approving the reduction of a damage award under the FCA to

(continued...)

II. The issue is recurrent and so this Court will have many opportunities to address it, should this Court's intervention ultimately be necessary.

Petitioner's argument about the recurrent nature of this issue is actually an argument against granting *certiorari* at this time. As we have already explained, two courts of appeals are poised to decide the issue and as petitioner itself pointed out, the issue has been widely addressed in the district courts. Pet. at 15-17. Should the courts of appeals themselves fail to resolve this issue, this Court will undoubtedly have other opportunities to step in.

III. The Seventh Circuit's decision is correct.

Contrary to Petitioner's claims that the Seventh Circuit's decision is "manifestly incorrect." Pet. 21, the Seventh Circuit faithfully followed the holdings of this Court and carefully analyzed the text and legislative history of the False Claims Act, both in its original form and after its more recent amendments. As we will now show, each of petitioner's arguments are wrong.

Petitioner claims that the Seventh Circuit was wrong to conclude that the word "person" was intended by the Congress in 1863 to include municipal corporations. Petitioner relies on four arguments to support this claim and entirely ignores the holdings and structure of *Stevens* and other opinions of this Court.

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[5] (...continued)
less than the full double damages mandated by the Act to avoid double jeopardy where the defendant already faced criminal sanctions), overruled on other grounds, *Hudson v. United States*, 522 U.S. 93 (1997).

First, petitioner argues that Congress' particular concern in 1863 to pursue fraud committed by private contractors during the Civil War creates a "context" in which the word "person" should not have its presumptive meaning. Pet. 21. But as this Court has held and the Seventh Circuit noted, "by 1844, both private and municipal corporations were presumptively included within the meaning of 'person.'" App. 8a, citing *Monell*, 436 U.S. at 685-89 (1978). During this period, "municipal corporations were routinely sued in the federal courts," *id.*, at 688; *see also id.*, at 673, n. 28 (citing *Board of Com'rs v. Aspinwall*, 65 U.S. (24 How.) 376 (1860), "and this fact was well known to members of Congress," *id.*, at 688, n. 50. An expressed concern in the legislative history for one type of fraud cannot overcome this presumption. *Cf. Stevens*, 529 U.S. at 1867-68.

Second, petitioner argues that the text of the FCA was not intended to apply to municipalities because it originally applied only to "any person not in the military" and included imprisonment as one of its possible penalties. Pet. 22. In making this argument, petitioner relies on *Stevens*' comment that aspects of the FCA's text "did not even make clear that private corporations," as opposed to natural persons only, were subject to its liability. But *Stevens* itself rejected this argument, accepting that §3729 extends to corporations "because the presumption with regard to corporations is . . . [that] they are presumptively *covered* by the term 'person'. . . ." 529 U.S. at 1868 (emphasis in the original).

Third, petitioner relies on legislative provisions that Congress *rejected*—provisions that would have restricted liability to members of the military or that would have subjected contractors who submitted false claims to court-martial. Pet. 22. These provisions, having been

rejected by Congress, offer little or no guidance into the meaning of the statute actually enacted. If anything, they establish the opposite of what petitioner argues—Congress rejected efforts to narrow the meaning of "person" and instead intended to rely on the broad presumptive meaning of the word.

Finally, petitioner criticizes the Seventh Circuit for considering the 1986 amendments and their legislative history. Specifically, petitioner argues that the 1986 Senate Report, which explains that the word person was intended to be given a broad meaning, must be disregarded in its entirety. Pet. 23. Neither reason petitioner gives for this argument holds water. Although petitioner is correct that *Stevens* found that the report erroneously stated that the 1863 meaning of the term "person" included states, 529 U.S. at 783, n. 12, nothing in *Stevens* suggests that the report was in error in any other respect. And while petitioner is likewise correct that the report's postenactment legislative history, is limited authority for the intent of the 1863 Congress, petitioner misrepresents the Seventh Circuit's use of the report. The Seventh Circuit relied on the report, as well as on other aspects of the 1986 amendments, to establish not what Congress intended in 1863, but, rather, to confirm that Congress in 1986 understood that municipalities were covered by the FCA and did not attempt to restrict or eliminate that coverage.[6] *Chandler*, 277 F.3d at 974-76; App. 8a-12a.

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[6] See, Senate Report, 99-345 (1986) ("Fraud permeates generally all government programs ranging from Welfare to . . . disaster relief programs."). Major disaster and emergency assistance programs are administered through states and local governments. 42 U.S.C. §5141 *et seq*.

Petitioner next claims that the 1986 amendments that the Seventh Circuit discussed establish that the 1863 Congress in fact did not intend for municipal corporations to be covered by §3729. Again, petitioner's arguments in support of this claim are simply wrong.

First, petitioner points to the change from double to treble damages, arguing that the Seventh Circuit erred by looking for an explicit exemption from damages, instead of looking for an affirmative sign that Congress intended to impose punitive damages on municipalities. Pet. 24-25. This argument, of course, has nothing whatsoever to do with the intent of the 1863 Congress, despite petitioner's assertion that it does. It is really an argument that when Congress increased the FCA's damages in 1986, it must be found to have repealed municipal liability *sub silentio*. After all, *Stevens* held that the meaning of "person" has remained unchanged, and *Stevens* held that the meaning of person in 1863 is based on the presumptive meaning of the word as it was understood at that time, which, the Court has held, included municipal corporations. *Monell*, 436 U.S. at 685-89. The Seventh Circuit precisely followed those teachings, and it established through careful examination of the 1986 legislative history and amendments, that Congress was aware that municipalities were indeed covered. Under those circumstances, the Seventh Circuit was quite correct in looking for a sign that Congress actually meant to eliminate municipal liability when it enacted the treble-damages provision.

Petitioner also takes issue with the Seventh Circuit's explanations for why some of the reasoning of *Newport*, which held that a municipality could not be subject to punitive damages under §1983, does not apply to the quite different damages regime of the FCA. Pet. 25-27.

Newport, of course, involved a statute that had no damages provision, so it applied the "common-law immunity of municipalities from punitive judgement." *Chandler*, 277 F.3d at 977; App. 14a. Here, in contrast, Congress has created a carefully-structured damages regime that (1) makes runaway verdicts against municipal "deep pockets" impossible; (2) recoups at least some of the damages from the monies provided to the municipality by the federal government instead of taking all damages, compensatory and otherwise, directly from the local taxpayers; (3) provides some measure of deterrence for politically-accountable municipal officials to defraud the federal government; and (4) ensures full compensation to the United States. These differences in the damages regimes are evidence of a different congressional intent in enacting the 1986 amendments than in enacting §1983. The Seventh Circuit appropriately relied on these differences to determine Congress' intent, not to make its own policy judgments about the merits of the FCA's damages provisions.

Third, petitioner takes issue with the Seventh Circuit's discussion of the explicit inclusion of municipal corporations in the CID provision of §3733, relying on *Stevens*' holding that the inclusion of states in this provision suggests that states are *not* included in §3729. But as *Stevens* itself explicitly pointed out, the CID provision included all sorts of entities clearly covered by §3729, including "any natural person, partnership, corporation, association, or other legal entity." 529 U.S. at 784, n. 14. The difference between states and all of these other entities is that states are presumptively not "persons," and all the others presumptively are. *Id. Stevens* thus entirely supports the Seventh Circuit's holding.

Finally, petitioner complains that the Seventh Circuit should not have relied on the Senate Report's explanation that the new whistleblower provision of the FCA covers public as well as private employers. Pet. 27. The Seventh Circuit reasoned that there would be no need to protect whistleblowers employed by public entities if such public entities were not covered by the FCA. *Chandler*, 277 F.3d at 975; App. 10a-11a. Petitioner counters with an elaborate argument about the other ways the federal government could impose liability on municipal corporations, which might well call for whistleblower protections, and argues that the Seventh Circuit should not "back door" municipal liability by looking to an "unrelated provision." Pet. 28. These arguments once again misconstrue the Seventh Circuit's reasoning. The Seventh Circuit does not suggest that the legislative history of the whistleblower provision, standing alone, would be sufficient to impose punitive damages on municipalities in a newly-enacted piece of legislation. Rather, the whistleblower provision and its history are support for the Seventh Circuit's conclusions that when Congress increased the damages from double to treble in a more-than-century-old statute, it was well aware that government entities were subject to liability and had no intention of repealing that liability *sub silentio*.[7]

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[7] As suggested *supra*, at 10 n. 5, even if the Court determined that the "essentially punitive" treble damages could not be imposed on municipalities, it could still honor congressional intent by subjecting them to the double damages (and $2,000.00 civil penalty) previously found to be compensatory. *United States v. Bornstein*, 423 U.S. 303, 315 (1976). To do so would preserve the intended coverage of the FCA and is consistent with the Court's precedent. *See Halper*, 490 U.S. at 448-50.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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